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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 760

SPORTSERVICE CORPORATION AND J. C. GRANATA,
Petitioners,

vs.

NORTHERN ILLINOIS DEVELOPMENT CORPORATION, OPERATING THE AURORA DOWNS, INC. (A WHOLLY OWNED SUBSIDIARY),
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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STATEMENT OF FACTS.

This involves an Agreement of Sale, relating to the Aurora Downs Race Track at Aurora, Illinois. The Sellers are Mr. Fox and St. Charles Bank. The Purchaser was Mr. Schwanz, whose place has been taken, by assignment, by Northern Illinois Development Corporation (NIDC). The Agreement was entered into in 1957. In 1959-1960 difficulties developed between Fox and NIDC, resulting in litigation in the Circuit Court of Kane County with regard to the Agreement. While this litigation was pending, and before it was resolved, Fox in 1960 induced three small Creditors of NIDC to file the Petition for Involuntary Bankruptcy in the present case.

This Bankruptcy Case, pending since 1960, has had two aspects, each involving prolonged and unnecessary controversy.

The Title Litigation.

The first aspect of this Bankruptcy Case has related to Title Litigation. It was necessary that the Title Litigation be resolved first, because the only substantial asset of NIDC, was its Equitable Interest as a Buyer of the Aurora Downs Race Track; and the workability of any Plan of Arrangement proposed by NIDC, as Debtor in the Bankruptcy Proceeding, depended directly on the existence or non-existence of that Equitable Interest. Fox argued that NIDC had been defaulted and that the Agreement of Sale had been forfeited. The Bankruptcy Referee held that there had not been a valid forfeiture and that the Agreement was still in force. Fox took successive Appeals to the District Court and to the United States Court of Appeals for the Seventh Circuit in 1961-1962. Both Courts affirmed the Referee's Decision. The Decision of the Court of Appeals was reported in *In re Northern Illinois Development Corporation*, 309 Fed. 2d 882 (CA-7, 1962). Fox then filed a Petition for Certiorari in the Supreme Court of the United States, October Term, 1962, No. 839. This Court, on April 15, 1963, denied that Petition for Certiorari. This concluded the first aspect of the Case. It meant that NIDC, as Debtor, had sufficient assets to propose a workable Plan of Arrangement.

The Plans of Arrangement with Creditors.

The second aspect of this Bankruptcy Case has related to Plans of Arrangement with Creditors. NIDC proposed its First Plan of Arrangement in 1960; a First Amended Plan in January, 1963; and a Second Amended Plan of Arrangement on June 21, 1963. Each Plan of Arrangement proposed

a sale of the NIDC Equitable Interest in the Race Track to a prospective Buyer; and distribution of the proceeds of sale to Secured Creditors and to Unsecured Creditors. NIDC at first had an Agreement with Hilton Inns, Inc., which has a Motel on part of the property, for the sale of the entire Race Track; but this Agreement eventually expired by its own terms and was not renewed. More recently, NIDC has had a series of Agreements with Titus Haffa, Chicago Industrialist, for the sale of its Equitable Interest in the Race Track to him, with the proceeds of sale to be distributed to Secured Creditors and Unsecured Creditors. The current proposed Sale Price is $1,200,000. Haffa has deposited $150,000 Cash with the Disbursing Agent of the Court, as Earnest Money. The Second Amended Plan of Arrangement with Creditors provides that the $1,200,000, together with certain Creditors, be distributed to Secured and Unsecured Creditors.

The Second Amended Plan of Arrangement was confirmed by an Order entered by the Referee on July 19, 1963. Four parties sought review of this Order, as follows:

(1) Fox (the Seller of the Race Track) continued his opposition to NIDC by seeking review, first in the United States District Court, and then in the United States Court of Appeals for the Seventh Circuit. Both Courts affirmed the Referee's Order Confirming the Second Amended Plan of Arrangement. Fox then dropped his opposition and has not filed a Petition for Certiorari. It has been reported that Fox is now ready to close the Sale of the Race Track to NIDC.

(2) Charles McFarland also sought review in the District Court and in the Court of Appeals. McFarland appears as a Shareholder of NIDC. He was represented by Fox's Attorneys. His action has paralleled that of Fox. Following the Decision of the Court

of Appeals, McFarland has dropped his objections and has not filed a Petition for Certiorari.

(3) Sportservice Corporation is an Unsecured Creditor of NIDC. Its business, and the nature of its position, are discussed hereinafter. It sought review of the Order of Confirmation in the District Court and in the Court of Appeals. Following the Decision of the Court of Appeals, Sportservice has filed the Petition for Certiorari in the present case.

(4) J. C. Granata is another Shareholder of NIDC. He is represented by the Sportservice Attorneys. His action has directly paralleled that of Sportservice, including joining in the Petition for Certiorari in the present case.

The Second Amended Plan of Arrangement, as has been stated, was confirmed by the Referee; and the Referee's Ruling was affirmed by the United States District Court and by the United States Court of Appeals. The Decision of the Court of Appeals was handed down on October 14, 1963 and is reported in *In re Northern Illinois Development Corporation*, 324 Fed. 2d 104 (CA-7, 1963).

The Sportservice-Granata Petition for Certiorari is the only such Petition pending. It is, in fact, a final effort to prevent consummation of the Second Amended Plan of Arrangement. While this Petition is pending, the Plan cannot be consummated. Consummation of the Plan requires, first, that the NIDC-Haffa Sale of the Race Track be concluded; and the Chicago Title and Trust Company will not issue a Title Policy so long as this Appeal remains unresolved. Viewed in its true light, therefore, the Sportservice-Granata Petition for Certiorari is nothing more or less than a blatant attempt to stall consummation of the Plan of Arrangement with Unsecured Creditors. The Petition raises no ground not already argued and disposed of by

the United States Court of Appeals. It should be summarily dismissed.

The Sportservice Position.

Sportservice is an Unsecured Creditor of NIDC. It is a corporation, with its home offices in Buffalo, New York, and is engaged in the business of leasing and operating Race Track Concessions, such as Parking Areas, Restaurant Facilities, and so on. It has been actively interested in the NIDC operation of the Aurora Downs Race Track from the start, including the one Harness Racing Meet held by NIDC in March 1959.

Sportservice has a Concession Agreement with NIDC. The Referee has entered an Order finding that this Executory Contract is still binding on NIDC and its Assignees. Sportservice also has a claim against NIDC for $55,000, growing out of Sportservice's payment of its guarantee of a Loan taken out by NIDC to purchase more gravel for the Parking Lot at the Race Track. When it finally became clear to Sportservice that the Plan of Arrangement could not pay very many dollars to Unsecured Creditors, Sportservice began filing Objections, persisting up to the point of this Petition for Certiorari.

Sportservice's position, therefore, is that it will harass NIDC, in a quest for preferential treatment. This, in spite of the fact that the law is absolutely clear that no Unsecured Creditor is entitled to preference over another. The real Sportservice position is that it wants a preference of some sort.

The Sportservice position, as argued in its Petition for Certiorari, is that the Second Amended Plan of Arrangement is inappropriate, because it is alleged to be just short of full liquidation, and because it affects Shareholders. These arguments were made before the Court of Appeals

and were disposed of in its Decision. These arguments are more ostensible than real. The real position of Sportservice has already been discussed. Even taking these arguments at face value, there is no ground whatsoever for further review by this Court. The Sportservice Petition should be dismissed.

The Granata Position.

J. P. Granata appears as a Shareholder of NIDC. Although the Bankruptcy Proceeding has been pending since November 1960, Granata filed no Appearance and made no Objections whatsoever, up until the point where Sportservice became unhappy over the fact that it would not receive its full $55,000. Then, Granata suddenly appeared, represented by Sportservice's Attorneys and filing Objections substantially parallel to those of Sportservice.

Granata's real position is completely transparent. He has joined in this Petition for Certiorari solely to support Sportservice. It is worth noting that, even if all of his Objections were sustained, he would receive nothing as a Shareholder of NIDC, because the inevitable result would be a Full Bankruptcy, with little, if any, payments to Unsecured Creditors and no equity whatsoever left for Shareholders. Granata, in short, has joined with Sportservice in an attempt to force the Debtor to give it a preference.

Granata's position, as set forth in the Petition for Certiorari, is that the Plan of Arrangement cannot be sustained, because it "affects Shareholders." This argument was made before the Court of Appeals and was rejected by that Court. It has no merit whatsoever. The Granata Petition for Certiorari, therefore, should be dismissed by this Court.

THE SPORTSERVICE-GRANATA PETITION FOR CERTIORARI STATES NO QUESTION MERITING REVIEW AND IT SHOULD BE SUMMARILY DISMISSED.

The Sportservice-Granata Petition argues that there should be further review by this Court on the ground that the Plan of Arrangement is contrary to law. NIDC contends that the Plan is supported by law and that there is no ground whatsoever for further review.

A. The Referee's Orders, Confirming the Sale of NIDC's Buyer's Interest in the Race Track, Are Fully Supported by Law.

The Sportservice-Granata Petition argues that the Referee's Order, confirming the sale of NIDC's Buyer's Interest in the Race Track, is not supported by law. It is argued that there cannot be a complete liquidation in a Chapter XI Proceeding. The case of *In Re Pure Penn Petroleum Co.*, 188 Fed. 2d 851 (C. A. 2, 1951), is cited as authority for this proposition.

NIDC contends that the Referee's Orders in this regard are fully supported in law. Section 313 of the Federal Bankruptcy Act (U. S. Code, Title 11, Section 713) vests power in the Federal Courts to authorize a Debtor to sell its property on such terms and conditions as the Court may approve.

The *Pure Penn Petroleum* case is not controlling in the present case. The assets being sold in the *Pure Penn* case were oil well pipes and equipment. Judge Frank held that such could not be sold under Chapter XI because the Referee in that case made no Finding that the asset was perishable or that an emergency existed. The assets being sold in the present case are entirely different—they consist of a Race Track, a speculative enterprise, perishable in

nature, and requiring as prompt action as possible. The Referee in the present case, moreover, specifically found that the asset was speculative and perishable, and also found facts clearly showing an emergency (Short Record 5, 6 and 7). The Court of Appeals said, in its Decision on the 1962 Appeal of the case, that the facts of the case "amply demonstrate the highly speculative nature of a purchase of the property for the use for which it is fitted, the use necessary to realization of its potential value." *In re Northern Illinois Development Corporation*, 309 Fed. 2d 882. The need for prompt action in the present case arises from two facts, peculiar to this case, namely, (1) NIDC owns only a Buyer's Interest in a Race Track, under the Fox-NIDC Agreement of Sale which must be performed or which will be lost; and, (2) NIDC has, after extended negotiation, succeeded in negotiating only one Agreement to sell its asset, the NIDC-Haffa Agreement, which itself must in turn be performed or which will be lost. The emergency is clear.

The Federal Bankruptcy Act permits a Referee to allow the sale of assets in a Chapter XI Proceeding, where adequate cause is shown. Not only was this proposition clearly resolved in the 1962 Appeal of this case, but it is also well supported in reason and in law. The case of *In re Magazine Associates, Inc.*, 46 Fed. Supp. 808 (D. C., N. Y. 1941), holds that a Plan of Arrangement under Chapter XI can include provisions for liquidation and distribution of assets.

The Sportservice-Granata Appeal completely fails to show that the Referee's Orders are clearly erroneous in this regard. It is clear that the Referee's Orders were well supported in law.

B. The Referee's Order, Approving the Sale Is Within the Requirements of the Federal Bankruptcy Act as Regards Consents of Unsecured Creditors. A Shareholder Has No Standing to Object.

The Sportservice-Granata Petition argues that Unsecured Creditor Sportservice has a right to seek reversal of the Referee's Orders, because the Plan is allegedly unfair to Unsecured Creditors. It further argues that Shareholder Granata has grounds to object, because the Plan allegedly affects the rights of Shareholders adversely. Both arguments must fail.

Unsecured Creditor Sportservice overlooks the fact that Section 362 of the Federal Bankruptcy Act (U. S. Code, Title 11, Sec. 762) provides a plan can be approved if consented to in writing by a majority in number and in dollars of all unsecured creditors. The Referee's Order of July 19, 1963 specifically finds that the Plan was so accepted by a majority of Unsecured Creditors. Sportservice has no standing to object on the ground that it is a non-consenting Unsecured Creditor.

Unsecured Creditor Sportservice, moreover, improperly summarizes the Plan of Arrangement. The Sportservice-Granata Brief repeatedly states that the Plan will result, not in a 5% First Distribution to Unsecured Creditors, but only in the "possibility" of such a Distribution. This is a misleading and improper statement. The Plan specifically *requires* that there be a 5% First Distribution to Unsecured Creditors (Short Record 14).

Shareholder Granata overlooks the fact that the entire purpose of a Chapter XI Plan of Arrangement is to make as equitable a settlement with Unsecured Creditors as possible; and that, in a case where it is unlikely there will be enough assets to more than effect a modest settlement with

Unsecured Creditors, a Shareholder has no equity and no ground to object. Moreover, the NIDC Plan proposes no corporate reorganization or stock issuance which would "affect" the rights of Shareholders. Finally, if Shareholder Granata's Objections were to be upheld, the end result would be that the Chapter XI Proceeding would have to be dismissed and the assets disposed of in an ordinary Bankruptcy Proceeding, with no prospect whatsoever that there would be any distribution either to Unsecured Creditors or to Shareholders. The Court of Appeals, in ruling on the 1962 Appeal, has already held "There is nothing in the record which indicates that a sale of the property under ordinary bankruptcy proceedings would produce any money for NIDC stockholders—in fact all indications are to the contrary." *In Re Northern Illinois Development Corporation*, 309 Fed. 2d 882.

The Sportservice-Granata Petition cites *In re May Oil Burner Corp.*, 38 Fed. Supp. 516 (D. C., Md., 1941), for the proposition that State Law requirements as to Shareholder consent must be observed. Granata, however, does not show there is any Shareholder equity available in the present case; and, absent any possibility of such equity, provisions as to Shareholder consent are not meaningful. Granata, moreover, raised no such objection to the Plans of Arrangement filed by NIDC in 1961 and in January 1963, under which it was equally improbable that there would be an equity for Shareholders. Granata's Objections now are tardy indeed.

The Sportservice-Granata Petition also cites the case of *General Stores Corp.* v. *Shlensky*, 350 U. S. 462 L. Ed. 550 (1955), as authority for the proposition that the Chapter XI Plan of Arrangement in the present case is contrary to law. The *Shlensky* case has nothing whatever to do with the present case. It involved a corporation which had issued over 2,000,000 shares of stock to over 7,000 share-

holders. The corporation's stock was listed on the American Stock Exchange. None of this is true in the present case. The NIDC stock is held by fewer than 100 Shareholders. It is not listed on any Exchange. Arguments about the propriety of a Chapter X Proceeding as against a Chapter XI Proceeding may have been controlling in the *Shlensky* case, but they have no bearing on the present case.

C. The Referee's Orders, Overruling the Sportservice-Granata Objections and Confirming the Plan of Arrangement, Are Supported by the Facts and the Law and Are Not Shown to Have Been Clearly Erroneous. The District Court Order, and the Decision of the Court of Appeals, Affirming the Rulings Below, Are Supported by the Facts and the Law.

The Sportservice-Granata Petition argues that the NIDC - Haffa Agreement, providing for a Sale of NIDC's interest in the Race Track at $1,200,000, is grossly unfair and inequitable. The Petition further argues that the Plan itself is grossly unfair and inequitable, in that Unsecured Creditors will not receive a substantial payment.

NIDC contends that, to put the matter in its proper perspective, some regard must first be paid to Rule 52 of the Federal Rules of Civil Procedure, which provides in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

In the present case, the Referee's Order of July 19, 1963, contains detailed Findings of Fact. The Referee made these Findings only after extended proceedings. The Referee heard all the initial evidence in the Trial Hearings in May and June, 1961. That evidence included testimony

as to the condition and value of the Race Track. The Referee also heard all the later evidence adduced at successive Hearings on the NIDC-Hilton Agreement and the NIDC-Haffa Agreements. The Referee found as a fact that NIDC had negotiated at length with Haffa for an increased price; that it was presently unable to obtain any higher price than $1,200,000; that NIDC had sought other possible purchasers; and that no such purchaser had come forward with a written offer.

NIDC contends that, under these circumstances, there is ample ground, both in fact and in law, supporting the Referee's Order confirming the Plan of Arrangement.

The Sportservice-Granata Petition implies that the Plan itself is unfair and inequitable. This completely ignores the established fact that a majority of Unsecured Creditors have filed their written Consents to the Plan. The Unsecured Creditors consented because they preferred to receive a 5% First Distribution as against nothing, which is all they would receive in a Full Bankruptcy Proceeding. Nor should it be forgotten that the Plan provides for a possible Second Distribution of the Damage Proceeds, if any, recovered from Fox and St. Charles Bank. The Sportservice-Granata Petition offers no alternative whatsoever, other than a Full Bankruptcy Proceeding, under which Unsecured Creditors would receive no distribution.

CONCLUSION.

Respondent NIDC respectfully submits that the Sportservice-Granata Petition for Certiorari should be summarily dismissed by this Court. This Petition is an effort to obtain a preference for Sportservice; or, in the alternative, to put NIDC into Full Bankruptcy. No preference, of course, can be given. Therefore, the inevitable result of the Sportservice-Granata Petition would be that NIDC would be thrown into Full Bankruptcy. It is significant that the Sportservice-Granata Petition, if followed to the logical result of a Full Bankruptcy, would produce no dollar recovery for Sportservice as an Unsecured Creditor and no equity for Granata as a Shareholder. The implications of this are clear. The Petition for Certiorari should be denied.

Respectfully submitted,

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